D.P.U. 95-DS-20

Adjudicatory hearing in the matter of a possible violation of G.L. c. 82, § 40 by Northern Sealcoating & Paving, Inc., Dennisport, Massachusetts.

APPEARANCES: Michael C. Collopy
Northern Sealcoating & Paving, Inc.
20 Candlewood Lane, Box 995
Dennisport, Massachusetts 02639
RESPONDENT

Gail J. Soares, Dig-Safe Investigator
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: DIVISION OF PIPELINE ENGINEERING AND SAFETY

I. INTRODUCTION

On August 18, 1995, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Northern Sealcoating & Paving, Inc. ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent had performed excavations on July 11, 1995 at Village Landing in Chatham without complying with the provisions of G.L. c. 82, § 40 ("Dig-Safe Law"). The NOPV also stated that the Respondent had the right either to appear before a Department hearing officer at an informal conference on September 21, 1995 or to send a written reply to the Department by that date.

On September 19, 1995, the Respondent submitted his written reply to the Department. On October 16, 1995, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of his right to request a formal adjudicatory hearing. On October 20, 1995, the Respondent requested an adjudicatory hearing with respect to the informal decision of the Division, pursuant to 220 C.M.R. § 99.07(3). The matter was docketed as D.P.U. 95-DS-20. After due notice, an adjudicatory hearing was held on January 24, 1996.

At the hearing, Gail J. Soares, a Dig-Safe investigator for the Division, appeared on behalf of the Division. The Division presented two witnesses: Richard P. Joyal, supervisor of electric maintenance for Commonwealth Electric Company; and Robert F. Smallcomb, director of the Division. Michael C. Collopy, a manager with the Respondent, appeared and testified on behalf of the Respondent. The evidentiary record consists of five Division exhibits, three Respondent exhibits, and one response to a Department record request.

II. POSITIONS OF THE PARTIES

A. The Division

The Division claims that on July 11, 1995, the Respondent was excavating an area located at Village Landing in Chatham, without having tendered proper notification to the underground facility operators at that location (Tr. at 4; Exh. Div.-2). In support of its contention that the Respondent was excavating, the Division presented two photographs depicting a backhoe allegedly breaking ground, and a third photograph depicting a truck with the name emblem of the Respondent on it (Exh. Div.-1, Attachment 1; Tr. at 8). Mr. Smallcomb stated that the photographs show a depression in the area of the backhoe blade which indicates that an excavation had occurred (Tr. at 22).

The Division also referred to the definition of "excavation" contained in the Department's regulations, 220 C.M.R. § 99.02, to support its contention that the Respondent was excavating in violation of the Dig-Safe Law (id. at 13).[1] According to the Division, there is no requirement that an excavation must be a certain depth in order to qualify as an excavation under the Dig-Safe Law or regulations (id, at 14-15). The Division stated that the act of penetrating the surface with a small blade is similar to boring and would qualify as an act of excavation (id. at 32).

The Division also posits that the Respondent failed to tender proper notice of this excavation (Exh. Div.-2). The Division contends that there was no Dig-Safe number for this

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[1] 220 C.M.R. § 99.02 provides:
Excavation shall mean the movement or removal of earth, rock, ledge or other materials in the ground to form a cavity, hole, hollow or passage therein. It shall include, but not be limited to, digging; trenching; grading; scooping; tunneling; augering; boring; drilling; pile driving; plowing-in or pulling-in pipe, cable, wire, conduit or other substructure; backfilling; demolition of any structure; and blasting, except in a quarry. Excavation shall not mean gardening or tilling the soil in the case of privately owned land.

excavation. The Division presented evidence that shows Dig-Safe yellow markings at the Chatham site, which, according to the Division, indicate that there is some sort of an underground facility present (Tr. at 8; Exh. Div.-1, Attachment 1). The Division stated that although the work area had been previously marked, each excavator is required to notify Dig-Safe of his proposed work because new facilities may have been installed after the Dig-Safe markings were placed (Tr. at 34).

The Division also presented evidence that the Respondent has previously been found liable for a violation of the Dig-Safe Law (RR-DPU-1).[2] The Division recommended a civil penalty of $500 for the alleged repeat violation (Exh. Div.-4, at 2). The Division stated that the Respondent did not cause any damage by his actions (Tr. at 20-21).

B. Respondent

The Respondent conceded that he was repairing potholes on private property at Village Landing in Chatham on July 11, 1995 (id. at 26). However, the Respondent contends that, because he would be removing only broken asphalt by handwork, notification to Dig-Safe was not required (id.; Exh. Div.-3). The Respondent also stated that the repair work was not an emergency, and that he had the contract for the work a month before he commenced the work (Tr. at 27).

The Respondent described his work as follows (id. at 26-27, 29-31). The Respondent stated that there were depressed sections of asphalt that were either loose or cracked (id. at 26).

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[2] The prior violation also involved the Respondent's failure to tender proper notification prior to excavation, but is distinguishable from the present situation. In the prior case, the Respondent contacted Dig-Safe, obtained a Dig-Safe number, but only waited 48 hours instead of the required 72 hours prior to excavation (RR-DPU-1).

The Respondent explained that in repairing a pothole, it is common practice to square off the area around the pothole by cutting the asphalt with a compressor, or jackhammer (id. at 29, 30). The compressor the Respondent used had a three-inch blade (id. at 30). The Respondent referred to photographs which depict a squared area of repavement (Exhs. Resp.-1; Resp.-2; Resp.-3). The Respondent further explained that a worker then lifted the broken pieces of asphalt by hand into a backhoe, which in turn dumped the asphalt into a truck for removal (Tr. at 27).

The Respondent contends that if one were required to contact Dig-Safe for every asphalt repair, an unreasonable expense would be borne by either the Commonwealth or the consumers (id. at 38).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

> No person shall, except in an emergency, contract for, or make an excavation ... in any public way, any public utility right of way or easement, or any privately owned land under which any public utility company, municipal utility department, natural gas pipeline company, or cable television company maintains facilities ... unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays ... before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation to such natural gas pipeline companies, public utility companies, cable television companies and municipal utility departments ... in or to the city or town where such an excavation is to be made.

The law is clear and unambiguous. Any company, contractor or person must properly notify the appropriate operators of underground facilities at least 72 hours before beginning an excavation whether performing excavation on public or private property. A.J. Schnopp, Jr., 87-DS-57, at 4 n.2, n.3 (1993); Industrial Contractors and Developers, D.P.U. 86-DS-25 (1988); John Farmer, D.P.U. 86-DS-102 (1987).

The Department's regulations at 220 C.M.R. § 99.02 define excavation as:

> the movement or removal of earth, rock, ledge or other materials in the ground to form a cavity, hole, hollow or passage therein. It shall include, but not be limited to, digging; trenching; grading; scooping; tunneling; augering; boring; drilling; pile driving; plowing-in or pulling-in pipe, cable, wire, conduit or other substructure; backfilling; demolition of any structure; and blasting, except in a quarry. Excavation shall not mean gardening or tilling the soil in the case of privately owned land.

IV. ANALYSIS AND FINDINGS

The threshold issue to be resolved in this case is whether the activities in which the Respondent was engaged on July 11, 1995 at Village Landing, Chatham qualify as excavation under the Dig-Safe Law and regulations and, if so, whether the Respondent violated the Dig-Safe Law.

The Dig-Safe Law and regulations include a broad definition of excavation so as to encompass many types of activities which result in the movement or removal of the earth or other materials in the ground. G.L. c. 82, § 40; 220 C.M.R. § 99.02. The record does not support a finding that the Respondent's use of a backhoe at Village Landing resulted in the movement or removal of earth or any material in the ground. However, the record does show that the Respondent's activity of squaring off an area of asphalt by using a compressor with a three-inch blade resulted in the removal of asphalt, a material in the ground. The record also shows that while Village Landing is private property, underground facilities were located under the property. Moreover, the Respondent stated that the work he performed was not an emergency repair. Thus, the Department finds that the Respondent's activities on July 11, 1995 at Village Landing, Chatham constitute excavation, pursuant to the Dig-Safe Law and regulations.

Inasmuch as the Respondent conceded that he did not notify Dig-Safe, the Department finds that the Respondent has violated the Dig-Safe Law and regulations by his excavation on July 11, 1995. The Department also finds that this is the Respondent's second violation of the Dig-Safe Law and regulations. The Department's Dig-Safe regulations state that "[i]n determining the amount of the civil penalty, the Department shall consider the nature, circumstances and gravity of the violation; the degree of the respondent's culpability; and the respondent's history of prior offenses." 220 C.M.R. § 99.11(2). Given that no damage occurred as a result of the Respondent's improper excavation, and based on the Division's recommendation, the Department finds that the Respondent shall be subject to the minimum penalty of $500 for this repeat offense.

VI. ORDER

Accordingly, after due notice, hearing, and consideration, it is

FOUND: That Northern Sealcoating & Paving, Inc. violated the Dig-Safe Law when it failed to tender proper notification relative to an excavation at Village Landing, Chatham on July 11, 1995; and it is

ORDERED: That Northern Sealcoating & Paving, Inc., being a repeat violator of the Dig-Safe Law, shall pay a civil penalty of $500 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of

Public Utilities, payable to the Commonwealth of Massachusetts, within thirty days of the date of this Order.

By Order of the Department,

John B. Howe, Chairman

Mary Clark Webster, Commissioner

Janet Gail Besser, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).